IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-623

TED BUTLER AND EMIL PETERS, ET AL,
Appellants,

versus

RICHARD C. DEXTER,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Continued)

CODES, STATUTES AND RULES

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The Appellee, pursuant to Rule 16 and 35 of the Rules of this Court, moves that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

Appellants list five numbered questions (Jurisdictional Statement, pp. 2-3) presented on this appeal.

Appellee suggests that the Supreme Court may be assisted by a restatement of the substance of the questions presented by this action as follows:

1. IS THE REQUIREMENT THAT THE ORIGINATING JUDGE BE DESIGNATED A MEMBER OF THE THREE JUDGE DISTRICT COURT [18 U.S.C. § 284] JURISDICTIONAL, SUCH THAT THE APPELLANT COULD WAIT FOR OVER ONE YEAR UNTIL AFTER AN ADVERSE DECISION ON THE MERITS TO COMPLAIN THAT THE ORIGINATING DISTRICT JUDGE WAS NOT NAMED TO THE THREE JUDGE PANEL WHICH HEARD THE INSTANT CASE CONSOLIDATED BY THE CHIEF JUDGE OF THE FIFTH CIRCUIT WITH OTHER SIMILAR CAUSES FROM THE SAME AND OTHER DISTRICTS?

2. DID THE DISTRICT COURT PROPERLY DETERMINE THAT THE APPELLANT'S CONDUCT CONSTITUTED "BAD FAITH, HARASSMENT, AND EXTRAORDINARY CIRCUMSTANCES" SUCH AS TO WARRANT FEDERAL INTERVENTION IN THE FELONY PROSECUTIONS UNDER THE TEXAS "CRIMINAL INSTRUMENT" STATUTE WHERE:

(a) THE APPELLANTS INITIATED MULTIPLE PROSECUTIONS UNDER AN INAPPROPRIATE STATUTE ON THE PRETEXT THAT APPELLEE DEXTER'S POSSESSION OF AN ORDINARY MOTION PICTURE PROJECTOR CONSTITUTED THE POSSESSION OF AN INSTRUMENT "SPECIALLY DESIGNED, MADE OR ADAPTED FOR

THE COMMISSION OF AN OFFENSE" THEREBY ELEVATING CONDUCT THE STATE LEGISLATURE HAD DESIGNATED A MISDEMEANOR TO A FELONY AND CAUSING APPROPRIATELY HIGH FELONY BONDS, WITHOUT ANY HOPE OF OBTAINING A CONVICTION AS EVIDENCED BY THE CLEAR LANGUAGE OF THE STATUTE, ITS "PRACTICE COMMENTARY" AND APPELLANT'S FAILURE TO PRESENT SAID CHARGES TO A GRAND JURY DURING MORE THAN A YEAR AFTER APPELLEE DEXTER'S ARREST; AND

(b) THE APPELLANT'S UTILIZED SAID CRIMINAL INSTRUMENT STATUTE TO MAKE MULTIPLE SEIZURES ON FOUR SUCCESSIVE OCCASIONS OF APPELLEE DEXTER'S ORDINARY 16 MILIMETER MOTION PICTURE PROJECTORS ON THE GROUNDS THAT SAID PROJECTORS CONSTITUTED CRIMINAL INSTRUMENTS "SPECIALLY DESIGNED, MADE OR ADAPTED FOR THE COMMISSION OF AN OFFENSE", SO AS TO EFFECTIVELY RESTRAIN PLAINTIFF'S MEANS OF EXPRESSION WHERE SUCH PROJECTORS WERE ADMITTEDLY UTILIZED FOR PROTECTED EXPRESSION.

STATEMENT OF FACTS

The Appellant's statement of the case does not correctly set forth the facts which indicate bad faith, harassment and prosecution brought without any realistic hope of conviction. The facts, essentially stipulated by the parties hereto in the Court below, were as follows:

> USE OF THE FELONY "CRIMINAL INSTRUMENT" STATUTE FOR A SUBSTANTIVE MISDEMEANOR.

The Appellants undertook multiple successive felony prosecutions under the Texas "Criminal Instrument" statute [§ 16.01 of the Texas Penal Code] against Appellee Dexter for the possession of ordinary 16 millimeter projectors used in the exhibition of the film entitled "Deep Throat" and seized said projectors on four separate occasions as "criminal instruments". [See Admissions of Fact, Pre-Trial Order (hereinafter referred to as Admissions), at pp. 5-9].

The "commercial exhibition" of obscene material was made a "Class B Misdemeanor" by the Texas Legislature in 1973. [§ 43.23 of the Texas Penal Code, Jurisdictional Statement, Appendix E, pp. 85-86]. However, the Appellants not only undertook to prosecute Dexter for the misdemeanor offense of "commercial obscenity"[1] but also for the possession of a "crim-

1 As noted in the District Court's opinion [Jurisdictional Statement, Appendix A, at pp. 55] Dexter did not challenge or seek to enjoin the misdemeanor charges brought against him under the "commercial obscenity" statute, § 43.23 of the Texas Penal Code, and same were tried prior to the entry of the District Court's opinion below.

inal instrument" (an ordinary motion picture projector) which is a felony [§ 16.01 of the Texas Penal Code] and provides for much more severe punishment than that for the misdemeanor of "commercial obscenity". Compare the punishment provisions for the criminal instrument statute [§ 12.34 of the Texas Penal Code, set forth as Appendix A, hereto] which provides a punishment range of two years to ten years and a fine not to exceed Five Thousand Dollars ($5,000.00) with those of the "commercial obscenity" statute [§ 12.22 of the Texas Penal Code, set forth as Appendix B, hereto] which provides for confinement not to exceed 180 days and a fine not to exceed One Thousand Dollars ($1,000.00).

By definition under the Texas Statute a "criminal instrument" is anything that is "specially designed, made, or adapted for the commission of an offense".

> " '(c)riminal instruments' means anything that is specially designed made or adapted for the commission of an offense". [§ 16.01 (b) of the Texas Penal Code].

Thus, Appellants initiated multiple prosecutions against Dexter and another theatre employee, for the possession of an "ordinary portable 16 millimeter projector" and on successive occasions seized said projectors on the ground that the possession of these ordinary projectors constituted the possession of a criminal instrument that was "specially designed, made or adapted for the commission of an offense". [See Admissions, at pp. 5-9, and § 16.01 of the Texas Penal Code].

It is admitted that the projectors at said theatre were "ordinary portable 16 millimeter projectors with removable interchangeable reels" [Admissions, at p. 11] and were utilized on other occasions to exhibit films that were Constitutionally protected expression and not subject to seizure. [Admissions, at p. 10].

CHRONOLOGY

On four successive occasions (every four days between June 24, 1974 and July 6, 1974) a San Antonio Police Officer viewed the identical film, "Deep Throat"[2], made a report, and pursuant to a procedure used heretofore in Texas, a Magistrate held a hearing at the theatre and upon "mimeographed" form motions, affidavits and warrants, provided by Appellant Butler[3], and on four successive occasions found "probable cause" to seize the "same film" as well as the motion picture projectors which were admittedly used for protected speech as well. On each occasion, the Magistrate's "mimeographed" warrant directed the officer to seize and "confiscate" these ordinary portable 16 millimeter projectors as "criminal instruments" pursuant to the felony provisions of § 16.01 of the Texas Penal Code. [Admissions, Exhibit "A", at p. 6].

On three of these occasions Dexter was arrested and charged with the possession of a "criminal instrument" [§ 16.01 of the Texas Penal Code], a felony, and "commercial obscenity" [§ 43.23 of the Texas Penal Code], a misdemeanor. [Admissions, at pp. 5-9]. Accordingly, high felony bonds were required[4] and Appellants filed complaints in both the misdemeanor and felony cases. However, while the misdemeanor cases for "commercial obscenity" were brought to trial, Appellants failed to ever present the felony "criminal instrument" cases to a Grand Jury during the entire one year that transpired between Dexter's arrests and the decision of the District Court below.

2 The stipulated facts revealed that on each successive occasion the "same film" was viewed and seized. [Admissions, at p. 6.]

3 These mimeographed forms provided by Appellant Butler were such that the Magistrate had only to fill in the date, time and place, the remaining verbiage including the Order to Seize not only the film but to "confiscate the criminal instruments" such as "motion picture projectors" as well. [Admissions, Exhibit "A", at pp. 1-7, and Transcript of Hearing before Three Judge Panel on November 15, 1974, at p. 121, l. 6-9].

Both in the Court below and in their Jurisdictional Statement to this Court, Appellants contended that they were prohibited from presenting the felony cases to the Grand Jury by the District Court's Temporary Restraining Orders. In actual fact, as the District Court noted in its opinion below, [Jurisdictional Statement, Appendix A, at p. 63], the Temporary Restraining Orders enjoined only further "seizures" and "arrests" and in no way prevented the state from presenting the pending cases to the Grand Jury and proceeding to trial. This was the clear understanding of Counsel for Appellants from the outset and the transcript of the hearing before the Managing Judge on August 12, 1974, reflects same:

> "MR. BURRIS: Your Honor, could I ask one question? Now, your prior temporary restraining order has not been in such language

4 Bonds of $25,000 and $5,000 were made by Dexter and another bond of $25,000 was reduced to $1,000. [Admissions, at pp. 5-9].

as to restrain us from prosecuting our present criminal cases. It's been an injunction against further arrests and seizures of film.

THE COURT: I don't think I am going to enjoin you from prosecuting these pending criminal cases . . ." [Transcript of Proceedings before Managing Judge on August 12, 1974, at p. 205, l. 16-25].

In fact, as the District Court noted in its opinion below, the Temporary Restraining Order of September 6, 1974, expressly provided that "no pending State criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases" [Temporary Restraining Order of September 6, 1974, set out as Exhibit "C" hereto]. Furthermore, if there could have been any lingering doubt in Appellant's mind same should have been cleared up at the hearing before the Three Judge District Court where the managing Judge admonished Appellants that the Restraining Orders did not in any way prevent them from presenting the felony indictments and in fact specifically excluded from their purview any "pending criminal prosecutions".

"MR. BURRIS: . . . [w]e have had a temporary restraining on us since July forbidding (us) from indicting these people.

JUDGE SINGLETON: Not from indicting anybody. I'm sorry. That Temporary Restraining Order does not come close to saying that, and you know it and I know it.

. . . I have never said a word about indictment and it specifically excludes pending criminal prosecutions. Sir, if you will just read it." Transcript of Hearing before Three Judge Panel on November 15, 1974, at p. 111, l. 1-16.

And yet even after Appellants were again specifically advised that the Restraining Orders did not prevent them from bringing felony indictments, appellants did not see fit to present such indictments during the almost nine month period that transpired between the hearing and the opinion entered by the Court below.

This refusal by Appellants to present the felony "criminal instrument" cases to the Grand Jury was indicative, as the District Court noted below [Jurisdictional Statement, Appendix A, at pp. 58-59], of the fact that "whatever motive the District Attorney now would claim", charging Dexter under the felony "criminal instrument" statute for possession of an ordinary motion picture projector ". . . cannot have been undertaken with any design to actually convict the Plaintiff of the crime". Equally as important is the fact that Appellant's failure to present the felony indictments frustrated the very rationale underlying this Court's holding in *Younger v. Harris*, 401 US 37 (1971), that "defense against a single criminal prosecution" in a State Court will in most instances be sufficient to protect any of defendant's Constitutional rights. For while Appellants complain that the State Courts are capable of determining such issues, their failure to present these charges to a Grand Jury, through no fault of Dexter, ". . . has prevented him from defending himself in a State Court" and present-

ing the Constitutional issues for consideration in that forum. [Opinion of District Court below, Jurisdictional Statement, Appendix A, at p. 63].

Appellants also complain that due to the fact that the Restraining Orders "... enjoined Appellants from arresting Appellee, Appellants were ... precluded from proceeding to the Grand Jury on the felony criminal instruments complaints" because "[H]ad indictments been returned by the Grand Jury, the State District Court would have *immediately issued a capias* for the arrest of Appellees and Appellants would have *automatically* been in violation of the TRO's issued by the Managing Judge". [Emphasis supplied — Jurisdictional Statement, at p. 17]. In fact the applicable State statute, Art. 23.03(a) of the Texas Code of Criminal Procedure [set forth as Appendix D hereto] specifically provides that such a capias or summons "need *not* issue for a defendant in custody or under bond", [emphasis supplied], and there can be little question that Dexter was at all times after his arrest at liberty on high felony bonds resulting from the "criminal instrument" charges.

Lastly, Appellants contend that they were unable to indict and try Dexter because he was out of the State of Texas and "Appellants could not secure his presence at a trial of the felony cases by summons but only through arrest and extradition — again a violation of the Temporary Restraining Orders" [Jurisdictional Statement, p. 17]. However, Appellants were able to obtain Dexter's voluntary appearance for trial on the misdemeanor charges and no attempt was made at that or any other time to seek an indictment or trial on the felony "criminal instruments" charges. In fact,

there is no evidence properly before the District Court that Dexter departed the State of Texas in the first place.

On July 12, 1974, after four successive seizures and arrests pursuant to the felony "criminal instruments" statute, Appellee Dexter filed his complaint in the United States District Court for the Western District of Texas challenging the criminal instrument statute on its face and as applied as well as, requesting the convention of a Three Judge District Court. The Three Judge District Court request was referred to the Honorable John R. Brown, Chief Judge, United States Court of Appeals for the Fifth Circuit, and it, like the case of *Southland Theatres v. Butler*, SA-73-CA-214, was transferred and consolidated by Judge Brown to be heard by one Three Judge District Court in the Southern District of Texas considering similar issues of fact and law arising in cases from several districts within the State.

While the District Judge to whom application for relief was originally presented was not designated as one of the members of the Three Judge Panel, Appellants made no objection to the fact at the time the panel was selected, or at any time during the year thereafter. It was not until some three months after the Three Judge Panel entered its opinion on the merits unfavorable to Appellants that Appellants first raised an objection to the composition of the District Court [Defendant's Motion to Vacate Decision of Three Judge Court and Remand to Originating Court, filed October 3, 1975]. Thus, Appellants withheld any complaint that the originating District Judge was not a

member of the Three Judge Panel until after said Three Judge Panel entered its opinion unfavorable to Appellants on the Merits. Accordingly, the District Court recently denied Appellants Motion raising such objection to the composition of the Panel noting that while it was "presented before a final judgment had issued" from the Court, same was filed after the Court's "prior memorandum opinion" and was overruled by the Three Judge "final judgment". [Order entered December 18, 1975, set out as Exhibit "E" hereto, at pp. 5a-7a].

Contrary to Appellant's intimation [Jurisdictional Statement at p. 15] no objection was made to the failure to designate the originating District Judge to the Three Judge Panel prior to the District Court's opinion on the merits adverse to Appellants. The parties hereto had been directed by the District Court to submit a pre-trial order setting forth all the contentions of each party as well as the facts which could be stipulated and those which were in dispute. Said Pre-Trial Order reflects that the only jurisdictional challenge to the Three Judge Panel made by Appellants prior to entry of the unfavorable decision was that Dexter had failed to demonstrate the necessary requisites of *Younger v. Harris, Supra*, and *Perez v. Ledesma*, 401 US 82 (1971) to incur the jurisdiction of the Three Judge Panel. [Pre-Trial Order, at pp. 2-5]. No challenge to the jurisdiction of the Three Judge Court on the grounds that the originating Judge was not designated to the panel was made until some three months after the District Court entered its opinion on the merits unfavorable to Appellants.

At the hearing before the Three Judge Panel, the District Court accepted for consideration the parties' stipulations [Pre-Trial Order, "Admissions", at pp. 5-11] and the Court admitted into evidence several affidavits and a deposition previously filed by Appellants pursuant to a "Motion for Introduction of Evidence" on November 13, 1974. When the District Court inquired of Counsel for Appellants whether they had any other evidence they wished to adduce Counsel replied that the "affidavits and depositions" would be sufficient as far as he was concerned.

> "JUDGE SINGLETON: . . . [a]nd you say you can go on what affidavits and depositions have been placed in the file?
>
> MR. BURRIS: I think if those affidavits and depositions are accepted, that that would be sufficient to fill in any gap insofar as testimony be concerned.
>
> JUDGE SINGLETON: All right, Sir. They will be accepted, the affidavits and depositions.
>
> MR. BURRIS: Thank you." [Transcript of Hearing before Three Judge Panel on November 15, 1974, at p. 10, l. 1-12.]

During the following eight months the Three Judge Panel took under consideration the matters admitted into evidence by stipulation of the parties and at the hearing before the Court. During this period that the Court had the case under advisement Appellants

attempted to introduce no further evidence, and it was not until some one month after the Three Judge Panel entered its opinion on the merits adverse to Appellants that they filed an instrument entitled "Motion for Relief from Judgment or Order and for Correction of Judgment" to which was attached voluminous affidavits and various other materials. Such materials were never admitted into evidence before the Three Judge Court, and were not filed or before said Court at the time that the opinion on the merits was entered and accordingly, are not properly before this Honorable Court.

REASONS FOR GRANTING THE MOTION TO AFFIRM

I. As To Appellants' Complaint That "The District Judge For The Western District Of Texas, To Whom Application For Injunction Was Made, Was Not Designated A Member Of The Three Judge Panel", Citing The Provision Of 28 U.S.C. § 2284.

This Court disposed of this very issue in *Hicks v. Miranda*, ___ U.S. ___, 45 L.Ed. 2nd 223 (1975), holding that the requirement of 28 U.S.C. § 2284, that the Judge to whom application for relief is presented shall constitute one member of the Three Judge Panel is not jurisdictional. *Hicks v. Miranda*, 45 L.Ed. 2nd, at p. 233, n. 5, and is waived unless timely presented.

Upon the originating Judge's request for a Three Judge Panel the Chief Judge of the United States Court

of Appeals for the Fifth Circuit consolidated the instant case with other similar causes for hearing[5].

The District Judge to whom application was originally made was not a member of the Three Judge Panel[6]; however, Appellees made no objection on such grounds at the time the panel was selected or for over one year thereafter until after the District Court had entered its opinion on the merits unfavorable to Appellees.

In *Hicks*, this Court held that the Appellant's objection to the composition of the Three Judge Panel for the first time before the Supreme Court was untimely and therefore waived. Likewise, in the instant case. Appellants made no objection to the fact that the District Judge before whom application was made was not designated to the panel at the time the panel was selected. It was not until months after the Three Judge Panel entered its opinion unfavorable to Appellants that an objection was raised on this ground for the first

5 Rule 42 of the Federal Rules of Civil Procedure provides that causes may be consolidated which involve common questions of law or fact.

6 The Chief Judge of the Fifth Circuit Court of Appeals consolidated this cause with similar causes from the same and other districts within the State. While Appellants argue that consolidation of claims from more than two districts violates the terms of 28 U.S.C. § 2284(1), requiring one member of the Three Judge panel to be a circuit Judge and one the originating Judge, this overlooks the fact that such consolidation, where not opposed, serves the purposes of judicial economy and convenience underlying Rule 42. F.R.C.P. See also: *Brotherhood of Locomotive Firemen & Engineermen v. Central of Georgia Ry. Co.*, 411 F 2nd 320 (Fifth Cir. 1969); *Wyndham Associates v. Birotiff*, 398 F 2nd 614 (D.C. Cir. 1968), cert. den. 393 US 977; *Continental Grain Co. v. the F.B.I.* — 364 US 19, (1960); and 28 U.S.C. § 1407, Manual for Complex and Multidistrict Litigation (1970), providing for transfer of causes to a different district for consolidation involving a common question fact.

time,[7] by filing a Motion to Vacate Decision of Three Judge Court and Remand to Originating Court on October 3, 1975.

Contrary to the implication left by Appellants in their Jurisdictional Statement [at p. 15], no objection to the composition of the Three Judge Panel was made prior to the District Court's opinion on the merits adverse to Appellants. The parties hereto had been directed by the District Court to submit a pre-trial order setting forth all the contentions of each party. Said pre-trial order reflects that only jurisdictional challenge to the Three Judge Panel made by the Appellants prior to entry of the unfavorable decision on the merits was that Dexter had failed to demonstrate the necessary "bad faith and harassment" required under *Younger v. Harris, Supra,* and *Perez v. Ledesma,* 401 US 82 (1971) to incur the jurisdiction of the Three Judge Panel. [Pre-Trial Order, at pp. 2-5]. The effect of Appellant's failure to raise a timely objection to the composition of the panel in the instant case is identical to that before this Court in *Hicks.* The requirement that the Judge to whom application for relief is made constitute a member of the panel [28 U.S.C. § 2284] is not jurisdictional and a party dissatisfied with the Judges designated to the panel should object at the time the panel is selected or at the earliest opportunity thereafter. Such procedure permits the proper and efficient administration of the judicial process. Otherwise, as here, a party who is disappointed with the decision of the Court would be

7 Not only did Appellant fail to ojbect to the composition of the panel prior to the adverse ruling on the merits but in fact filed repeated motions for convention of the Three Judge Court.

able to obtain a second bite at the apple by withholding objection to the failure to designate the District Judge to whom the case was first presented until after an adverse decision.

Appellants laid behind the log in the instant case, and having waited until after the District Court entered the opinion below, they have waived their right to object to the composition of the panel and cannot do so for the first time after the District Court has rendered its decision unfavorable to them.

II. As To The Appellants' Contention That The Requirements Of *Younger v. Harris, Supra,* And *Perez v. Ledesma,* 401 US 82 (1971) Were Not Met So As To Preclude Federal Interlocutory Relief Against Pending State Prosecutions.

"MULTIPLE SEIZURES" WAS ALTERNATIVE HOLDING

Appellants strenuously argue that *Heller v. New York,* 413 US 483 (1973) does not require a "final determination by a jury" that a motion picture film is obscene before subsequent copies of that same film can be seized. However, the District Court below in fact did not hold that a final determination of obscenity by a "jury" is required. It simply held that a hearing whose sole function was to determine only "probable obscenity", even if in a minimally adversary environment, would not suffice to warrant multiple successive seizures of the same film thereby effectively imposing a "final restraint" on its exhibition.

[Opinion of the District Court below, Jurisdictional Statement, Appendix A, at p. 60].

What Appellant seems to overlook is the fact that this rationale is only an alternative holding of the District Court below. Rather, the District Court's opinion is premised primarily upon Appellant's use of a grossly inappropriate statute in an attempt to charge Dexter with a felony for conduct which is substantively a misdemeanor and forcing him to make successive high felony bonds, where such prosecutions were brought without any realistic hope of obtaining convictions in the first place.

PROSECUTIONS BROUGHT WITHOUT HOPE OF CONVICTION

In their Jurisdictional Statement Appellants ignore the fact that it is well-settled that where State authorities bring prosecutions without any reasonable expectation of obtaining convictions such in and of itself warrants federal intervention to enjoin such prosecutions. In *Younger v. Harris, Supra*, the Supreme Court noted that where, as here, there is a "substantial allegation" that the attempts ". . . to enforce the statutes against Appellants are not made with any expectation of securing valid convictions", a federal injunction against enforcement of those prosecutions would "properly issue". *Younger v. Harris, Supra*, at p. 48.

Previously, the Supreme Court had authoritatively spoken to this very point in *Dombrowski v. Pfister*, 380 US 479 (1965), holding that where prosecuting

authorities have invoked the criminal process "without any hope of ultimate success", then federal injunctive relief is warranted since any "interpretation ultimately put on the statutes by the State courts is irrelevant". *Dombrowski v. Pfister, Supra*, at p. 490. Even if the courts were to hold the particular statutes inapplicable to the individuals in question this would not alter the impropriety of the prosecuting authorities invoking such criminal process in bad faith to discourage presumptively protected activities. *Dombrowski v. Pfister, Supra*, at p. 490. This is specially true, where, as here, the authorities have brought a series of such prosecutions against which the individual will have to defend.

> "[a]ppellants have attacked the good faith of the appellees in enforcing the statutes, claiming that they have invoked, and threaten to continue to invoke, criminal process without any hope of ultimate success, but only to discourage appellants' . . . activities. If these allegations state a claim . . . as we believe they do . . . the interpretation ultimately put on the statutes by the state courts is irrelevant. For an interpretation rendering the statute inapplicable to [the appellants] would merely mean that appellants might ultimately prevail in the state courts. It would not alter the impropriety of appellees' invoking the statute in bad faith to impose continuing harassment in order to discourage appellants activities". *Dombrowski v. Pfister, Supra*, at p. 490.

More recently, this Court reiterated that "federal injunctive relief against pending state prosecutions is appropriate" where, as here, prosecutions have been undertaken "without hope of obtaining a valid conviction". *Perez v. Ledesma*, 401 US 82, at p. 85 (1971)[8].

In the instant case, Appellants have arrested and charged Dexter on successive occasions under the State's felony "criminal instruments" statute [§ 16.01 of the Texas Penal Code] for an offense which the Texas Legislature has designated as a misdemeanor ["commercial obscenity", § 43.23 of the Texas Penal Code]. These prosecutions have been brought under the pretext that Dexter's possession of "ordinary" motion picture projectors, admittedly used for protected activities, constituted the possession of instruments "specially designed, made or adapted for the commission of an offense". There could be no realistic hope of obtaining convictions on such prosecutions. In addition to these multiple felony prosecutions the Defendants made repeated multiple seizures of these "ordinary" motion picture projectors as "criminal instruments", thereby effectively precluding Dexter from exhibiting even Constitutionally protected films which the Appellants admit he engaged in.

The State legislature made the commercial exhibition of obscene films a "Class B Misdemeanor" [§ 43.23 of the Texas Penal Code].

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8 See also: *Sooner State News Agency, Inc. v. Falls* (N.D. Okla. 1973) 367 F. Supp 523, [Three Judge Court] noting that where there is a showing ". . . that in fact or law there is no reasonable grounds for Defendants to maintain these criminal cases against [the Plaintiffs]" then federal injunctive relief against such state prosecutions is proper, at p. 526.

However, the "criminal instrument" statute under which Appellants have brought multiple charges against Dexter is a felony statute [§ 16.01(c) of the Texas Penal Code] with much more severe penalties than the appropriate misdemeanor "commercial obscenity" statute. [Compare punishment provisions for "criminal instruments" (§ 12.34 of the Texas Penal Code) with those for "commercial obscenity" (§ 12.22 of the Texas Penal Code)]. The statute defines a "criminal instrument" as anything that is *specially* designed, made or adapted for the commission of an offense". [(emphasis added), § 16.01(b) of the Texas Penal Code]. To say that an "ordinary" motion picture projector is an instrument "*specially* designed, made or adapted for a commission of an offense" is patently absurd and the Appellants could have no realistic hope of obtaining a valid conviction on prosecutions brought on such a theory.

These "ordinary . . . 16 millimeter motion picture projectors with removable, interchangeable reels" were "designed" and "made" for the purpose of expression, the exhibition of motion picture film, and not for the commission of any offense. Further, these projectors were not modified or "adapted" in any way for the projection of the film here in question. They were the exact same, identical "ordinary 16 millimeter motion picture projectors" that were used to exhibit the admittedly Constitutionally protected films.

As the District Court below aptly noted:

> "The words of some part (b) of [the "criminal instrument" statute] clearly indicate that a

> criminal instrument is not equipment which is designed, made or adapted for a lawful use, but which incidentally may be used for a commission of a crime. There are many, many common, ordinary every day objects which can be used to commit crimes, but these are not criminal instruments." [Opinion of District Court below, Jurisdictional Statement, Appendix A, at p. 57].

The District Court below went on to note that if the clear language of the statute is not sufficient to guide law enforcement officers then the "practice commentary" designed to assist the practitioner utilizing the newly enacted statute makes clear that things "frequently used in crime, but which have common lawful uses, are excluded from the purview of Section 16.01, because possession of such things, alone, is conduct too ambiguous for imposition of the criminal sanction". [Opinion of District Court below, Jurisdictional Statement, Appendix A, at p. 58, quoting Vernon's Annotated Penal Code, 1974, § 16.01, at p. 542.]

Such "ambiguity" would be especially reprehensible, where, as here, the "common lawful use" of such thing lies within the purview of protected free expression. As the District Court below notes this statute is aimed at "incipient crime" and is not aimed at the possession of instruments which have lawful uses.

In short, the Appellants undertook a bootstrapping transmogrification of the State's misdemeanor "commercial obscenity" statute into a felony offense, on the spurious pretext that the possession of an ordinary motion picture projector constituted a "criminal instrument . . . specially designed, made or adapted for the commission of an offense". The mere statement of the proposition defies logic. Appellants could entertain no reasonable expectation of obtaining a valid conviction and the District Court below so found:

> "Charging the Plaintiff with a section 16.01 violation with whatever motive the District Attorney now would claim cannot have been undertaken with any design to actually convict the Plaintiff of the crime. The articles which Plaintiff possessed are stipulated to be ordinary 16 millimeter portable film projectors. Such a blatant use of an inappropriate statute, which bootstrapped the misdemeanor offense into a felony was effective in requiring that bail for a felony offense be set, not once but several times. The authorities could not believe, however, that Dexter would ultimately be convicted." [Opinion of District Court below, Appendix A, at pp. 58-59].

It has often been noted that prosecutions under inapplicable statutes may constitute the "bad faith" and "harassment" required to invoke the federal courts' intervention. Here we are not only faced with the bad faith harassment of [the authorities] invoking a nonapplicable ordinance", *Haul v. Petrillo* (Second Cir. 1971) 439 F 2nd 1184, at pp. 1186-1187, n. 1; *Wulp v. Corcoran* (First Cir. 1972) 454 F 2nd 826, at p. 831, n. 6, but with multiple prosecutions and seizures of the very means of expression pursuant to that inapplicable statute.

The fact that Appellants failed to ever present the felony "criminal instrument" cases to a Grand Jury is indicative of the fact that Appellants could have no reasonable expectation of obtaining a conviction and that these successive prosecutions served only to harass Dexter and require multiple high felony bonds. In fact, Dexter here was faced with the worst of all possible situations. Like someone who has been indicted, Dexter had the disadvantage of facing multiple felony prosecutions under an inappropriate statute for what was in substance a misdemeanor and being required to make successive high felony bonds. While at the same time, unlike an individual who has not been arrested or charged [see: *Steffel v. Thompson*, 415 US 452 (1974)], Dexter has the disadvantage of being unable to vindicate his Constitutional rights since pursuant to State law [Texas Constitution, Article I, § 10] a felony prosecution does not actually begin until a Defendant is indicted and consequently his remedies under State law were nonexistant. As the District Court below stated:

> "This Court believes that a further reason for the inapplicability of the *Younger* decision in this case is the fact that the State failed to present these charges to the Grand Jury and through no fault of the Plaintiff has prevented him from defending himself in a State Court." [Opinion of District Court below, Jurisdictional Statement, Appendix A, at p. 63].

Both in the Court below and in their Jurisdictional Statement to this Court, Appellants attempt to justify their failure to present these felony "criminal instruments" cases to the Grand Jury on the ground that

they were prohibited from doing so by the District Court's Temporary Restraining Orders. In actual fact, as the District Court noted in its opinion below [Jurisdictional Statement, Appendix A, at p. 63], the Temporary Restraining Orders enjoined only further "seizures" and "arrests" and in no way prevented the state from presenting the pending cases to the Grand Jury and proceeding to trial. This was the clear understanding of Counsel for Appellants from the outset and the transcript of the hearing before the Managing Judge on August 12, 1974, reflects same:

> "MR. BURRIS: Your Honor, could I ask one question? Now, your prior temporary restraining order has not been in such language as to retrain us from prosecuting our present criminal cases. It's been an injunction against further arrests and seizures of film."
>
> THE COURT: I don't think I am going to enjoin you from prosecuting these pending criminal cases . . ." [Transcript of Proceedings before Managing Judge on August 12, 1974, at p. 205, l. 16-25].

And, as the District Court noted in its opinion below, the Temporary Restraining Order of September 6, 1974, expressly provided that "no pending State criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases" [Temporary Restraining Order of September 6, 1974, set out as Exhibit "C" hereto]. Furthermore, if there could have been any lingering doubt in Appellant's mind

same should have been cleared up at the hearing before the Three Judge District Court where the managing Judge admonished Appellants that the Restraining Orders did not in any way prevent them from presenting the felony indictments and in fact specifically excluded from their purview any "pending criminal prosecutions".

> "MR. BURRIS: . . . [w]e have had a temporary restraining order on us since July forbidding (us) from indicting these people.
>
> JUDGE SINGLETON: Not from indicting any body. I'm sorry. That Temporary Restraining Order does not come close to saying that, and you know it and I know it.
>
> . . . I have never said a word about indictment and it specifically excludes pending criminal prosecutions. Sir; if you will just read it." Transcript of Hearing before Three Judge Panel on November 15, 1974, at p. 111, l. 1-16.

And yet even after Appellants were again specifically advised that the Restraining Orders did not prevent them from bringing felony indictments, appellants did not see fit to present such indictments during the almost nine month period that transpired between the hearing and the opinion entered by the Court below.

Appellants also complain that due to the fact that the Restraining Orders ". . . enjoined Appellants from arresting Appellee, Appellants were . . . precluded

from proceeding to the Grand Jury on the felony criminal instruments complaints" because "[H]ad indictments been returned by the Grand Jury, the State District Court would have *immediately issued a capias* for the arrest of Appellees and Appellants would have *automatically* been in violation of the Temporary Restraining Orders issued by the Managing Judge". [Emphasis supplied — Jurisdictional statement, at p. 17]. In fact, the applicable State statute, Art. 23.03(a) of the Texas Code of Criminal Procedure [set forth as Appendix D hereto] specifically provides that such a capias or summons "need *not* issue for a defendant in custody or under bond", [emphasis supplied], and it is admitted here that Dexter was at all times after his arrest, at liberty on felony bonds resulting from the "criminal instrument" charges.

Lastly, Appellants contend that they were unable to indict Dexter because he was out of the State and they could secure his presence "only through arrest and extradition — again a violation of the Temporary Restraining Orders" [Jurisdictional Statement, p. 17]. However, Appellants were able to obtain Dexter's voluntary appearance for trial on the misdemeanor charges some eight months before the District Court's decision in the instant case and no attempt was made at that or any other time to seek an indictment or trial on the felony "criminal instruments" charges. In fact, there is no evidence properly before the District Court that Dexter departed the State of Texas in the first place.

This refusal by Appellants to present the felony "criminal instrument" cases to the Grand Jury was in-

dicative, as the District Court noted below [Jurisdictional Statement, Appendix A, at pp. 58-59], of the fact that "whatever motive the District Attorney now could claim", charging Dexter under the felony "criminal instrument" statute for possession of an ordinary motion picture projector ". . . cannot have been undertaken with any design to actually convict the Plaintiff of the crime". Equally as important is the fact that Appellant's failure to present the felony indictments frustrated the very rationale underlying this Court's holding in *Younger v. Harris*, 401 US 37 (1971): that "defense against a single criminal prosecution" in a State Court will in most instances be sufficient to protect any defendant's Constitutional rights. For while Appellants complain that the State Courts are capable of determining such issues, their failure to present these charges to the Grand Jury, through no fault of Dexter, ". . . has prevented him from defending himself in a State Court" and presenting the Constitutional issues for consideration in that forum. [Opinion of District Court below, Jurisdictional Statement, Appendix A, at p. 63].

CONCLUSION

1. The requirement of 28 U.S.C. § 2284 that the District Judge shall constitute one member of the Three Judge Panel is not jurisdictional and Appellants' belated objection to the composition of the Court on such grounds was untimely and, therefore, waived where raised for the first time after the Three Judge Panel had entered its opinion on the merits unfavorable to them.

2. The Appellants herein had no realistic hope or expectation of convicting Plaintiff Dexter on the felony criminal instrument charges initiated by them for an offense which is in substance a misdemeanor on the spurious pretext that the possession of a common, "ordinary" motion picture projector constituted the possession of a "criminal instrument . . . specially designed, made or adapted for the commission of an offense".

The multiple prosecutions under the State's felony "criminal instruments" statute for a crime which is substantively a misdemeanor, the requirement of successively high felony bonds, the repeated multiple seizures of ordinary motion picture projectors as "criminal instruments", the repeated multiple seizures of the same identical film prior to an adjudication of obscenity "on the merits", constituted "bad faith", "harassment" and "exceptional circumstances" warranting the declaratory and injunctive relief provided by the District Court below.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, GERALD H. GOLDSTEIN, hereby certify that three (3) copies of this Motion to Affirm were mailed by United States Mail, postage prepaid, to Mr. Keith W. Burris, Attorney for Appellant, Ted Butler, Assistant District Attorney, Bexar County Courthouse, San Antonio, Texas — 78205, and Mr. Edgar Pheil, Attorney for Appellant, Emil Peters, City Attorney's Office, San Antonio City Hall, San Antonio, Texas — 78205, on this the ____ day of December, 1975. I further certify that all parties required to be served have been served.

Gerald H. Goldstein
Levey and Goldstein
29th Floor Tower Life Bldg.
San Antonio, Texas 78205

APPENDIX A

SUBCHAPTER C.
ORDINARY FELONY PUNISHMENTS

Sec. 12.34. Third-Degree Felony Punishment

(1) An individual adjudged guilty of a felony of the third degree shall be punished by confinement in the Texas Department of Corrections for any term of not more than 10 years or less than 2 years.

(b) In addition to imprisonment, an individual adjudged guilty of a felony of the third degree may be punished by a fine not to exceed $5,000. Amended by Acts 1973, 63rd Leg., p. 1125, ch. 426, art. 2, § 2, eff. Jan. 1, 1974.

APPENDIX B

SUBCHAPTER B.
ORDINARY MISDEMEANOR PUNISHMENTS

Sec. 12.22. Class B Misdemeanor

An individual adjudged guilty of a Class B misdemeanor shall be punished by:

(1) a fine not to exceed $1,000;
(2) confinement in jail for a term not to exceed 180 days; or
(3) both such fine and imprisonment.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

* * *

UNIVERSAL AMUSEMENT CO., INC., ET AL.,
Plaintiffs

versus CA NO. CA 73-H-528

CAROL VANCE, ET AL.,
Defendants

* * *

TEMPORARY RESTRAINING ORDER

* * *

CAME ON to be heard in the above numbered and entitled cause and the companion cases which have been consolidated of this cause, and the court having considered the pleadings on file herein, the evidence adduced before other courts in the companion consolidated cases and the arguments of counsel, and the court being of the opinion that irreparable damage may occur to Plaintiffs herein unless State proceedings are stayed and enjoined until the three-judge panel can meet, hear and decide this matter, it is hereby

ORDERED that all State proceedings and activities with regard to the Plaintiffs in the consolidated cases

be enjoined and stayed until the three-judge panel can meet and decide the causes consolidated in the subject cause, including any further proceedings in cases where injunctions are sought against the exhibition of allegedly obscene movies or against bookstores who allegedly commercially distribute obscene books and magazines, and any further arrests and seizures are enjoined insofar as the Plaintiffs herein are concerned until the three-judge panel can meet and make its determination;

However, no pending state criminal prosecutions are enjoined and the State is free to bring to trial and try any such cases and it is further DECREED that this Order shall not apply to the following cases consolidated herein:

Sun Family Entertainment Center, d/b/a Sun Theater v. Tom Hanna, et al.; Civil Action No. B-74-142-CA

Southland Theatres, Inc., et al. v. Butler, et al; Civil Action No. SA 73-CA-214

Cinema X, Inc., et al. v. Tim Curry, et al.; No. CA-4-74-28

Ellwest Sterio Theatres, Inc. v. T. S. Walls, et al.; No. CA-4-74-45

DONE at Houston, Texas, on this 6th day of September, 1974.

/s/ JOHN V. SINGLETON
United States District Judge

APPENDIX D

CODE OF CRIMINAL PROCEDURE

Art. 23.03 Capias or summons in felony

(a) A capias shall be immediately issued by the district clerk upon each indictment for felony presented, or upon the request of the attorney representing the State, a summons shall be issued by the district clerk, and shall be delivered by the clerk or mailed to the sheriff of the county where the defendant resides or is to be found. A capias or a summons need not issue for a defendant in custody or under bond.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNIVERSAL AMUSEMENT CO., ET AL.

versus CA No. 73-H-528
Consolidated

CAROL VANCE, ET AL.

CONSOLIDATED WITH

RICHARD C. DEXTER

versus CA NO. SA-74-CA-168

TED BUTLER, ET AL.

AND

SOUTHLAND THEATRES, INC.

versus CA NO. SA-73-CA-214

TED BUTLER, ET AL.

ORDER

There are several motions before this court which the court shall dispose of as follows:

1. *Motion to vacate decision of three-judge court and remand to originating court.* This motion is

premised on the erroneous conclusion that this three-judge panel is without jurisdiction in the present matter. The motion, presented before a final judgment had issued from this court, is obviously implicitly overruled simply by the fact that this court has in fact issued a final judgment pursuant to our prior memorandum opinion. However, so that there shall remain no doubt as to this court's position, we hereby expressly DENY defendants' motion to vacate and remand. Having determined that we have the power to consider the issues presented to this court, several cases have been remanded but solely to consider the limited issues set forth in our memorandum opinion, specifically on page 60 thereof. Among those cases remanded for such limited purpose is *Southland Theatres, Inc. v. Ted Butler, et al.*, SA-73-CA-214.

2. *Motion to retrieve record.* This motion has been rendered moot by the fact that the relevant records are now before the Fifth Circuit after transmittal from San Antonio.

3. *Motion for order nunc pro tunc.* Defendants seek that a motion styled "Motion for Ruling on Motion for Suspension of Court's Final Orders and Permanent Injunction Pending Appeal" shall be filed and made a matter of record as of October 4, 1975. Such motion to file is granted.

Further, this court shall now address defendants' original motion requesting suspension of any final order and of any injunction issuing from this court, pending appeal. A complication is that defendants' motions regarding suspension were premature since

this court issued no final order until November 4, 1975. However, now that a final order has in fact been issued, this court hereby DENIES defendants' motion.

This court is unpersuaded by defendants' arguments in brief and would not retreat from its position articulated in its prior memorandum opinion. We are convinced that justice and circumstances require that this court's final judgment and orders of remand be implemented without delay. Defendants are specifically directed to see this court's order with regard to *Richard C. Dexter v. Ted Butler, et al.*, SA-74-CA-168, found at page 2 of the final judgment in this action.

DONE at Houston, Texas, on this the 18th day of Dec., 1975.

/s/ JOHN V. SINGLETON
John V. Singleton
Managing Judge